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ACCESSORY LIABILITY AND COMMON UNLAWFUL PURPOSES

THE common law governing so-called “joint enterprises” has been under stress in recent years. On occasion, juries have been unduly willing to find the existence of a shared criminal purpose between wrongdoers and their friends, and to find foresight by those friends of what the wrongdoers might do. A perception of injustice can only be compounded by the constructive nature of homicide crimes. Those who neither kill, nor foresee any risk that their colleague may kill, might yet be eligible for a conviction running even to murder. Many have therefore welcomed a ruling that joint enterprise liability is no more, at least in England and Wales. In *Jogee* and *Ruddock*,¹ the Supreme Court joined with the Privy Council to abolish it. Yet the High Court of Australia demurred when invited in *Miller* to do the same.² So the law of joint enterprise is no longer common.

Of course, divergence between two of the common law’s most senior courts is hardly unknown, even on fundamental criminal-law questions. The High Court famously went its own way in the wake of *DPP v Smith*,³ when their Lordships adopted an objective test of intention. Neither did it endorse *Metropolitan Police Commissioner v Caldwell*,⁴ when the House of Lords redefined recklessness. Strikingly, however, those are decisions that the English courts came to disavow. Over time, London became realigned with Canberra. Should we hope the same will happen again?

I. TWO INTERCONNECTED QUESTIONS

In order to understand the latest divide between our jurisdictions, we need to specify more precisely what the Supreme Court did in *Jogee*. Most prominently, the Court abolished what in Australia is called the doctrine of *extended joint criminal enterprise*,⁵ sometimes known in England as “parasitic accessorial liability”.⁶ According to that doctrine, where S, the secondary party, and P, the perpetrator, form a common unlawful purpose to commit a crime (crime A), and set out together to pursue it, then in addition to any liability S may have regarding crime A, S becomes liable as a party to any further crime (crime B) committed by P in the pursuance of crime A, provided S realises that a crime of that further type is a possible upshot of their carrying out the common purpose.⁷ Extended joint criminal enterprise liability therefore supplies a distinct channel of complicity liability, separate from aiding and abetting because it does not require the prosecution to prove specifically that S has assisted or encouraged crime B.⁸ Indeed, as the House of Lords recognised in *Powell*, it operates to sustain

¹ *Jogee* [2016] UKSC 8; *Ruddock* [2016] UKPC 7; [2016] 2 W.L.R. 681. For convenience, the joint appeal will be referred to here as *Jogee*.

² *Miller v The Queen*; *Smith v The Queen*; *Presley v DPP for South Australia* [2016] HCA 30. (Hereafter cited as *Miller*.)

³ [1961] A.C. 290; [1960] 3 All E.R. 161 (HL); rejected in *Parker v The Queen* [1963] HCA 14; (1963) 111 C.L.R. 610 (reversed on other grounds (1964) 111 C.L.R. 665). In *Parker*, the High Court preferred its own precedents, notably *Smyth* [1957] HCA 24; (1957) 98 C.L.R. 163, with Dixon CJ describing the House of Lords decision as “misconceived and wrong”. For the first time, House of Lords decisions were disavowed as binding upon Australian law: see, especially, at 632.

⁴ [1982] A.C. 341; [1981] 1 All E.R. 961 (HL). The decision was largely ignored by the High Court of Australia, which like many jurisdictions continued to prefer a subjective test: see, e.g., *Crabbe* [1985] HCA 22; (1985) 156 C.L.R. 464 and *Royall v The Queen* [1991] HCA 27; (1991) 172 C.L.R. 378.

⁵ See, e.g., *Miller*, at [3]–[5]. The Australian terminology is perspicacious notwithstanding the worries noted in *Jogee*, at [77], to which the High Court in *Miller* responded at [45].

⁶ *Gnango* [2011] UKSC 59; [2012] 1 A.C. 827 at [42]–[43] (Lords Rodger and Brown, Lord Wilson concurring), [94]–[96] (Lord Dyson). The phrase was coined by J.C. Smith, “Criminal Liability of Accessories: Law and Law Reform” (1997) 113 L.Q.R. 453.

⁷ As is noted in *Miller* (at [43]–[44]), crime B must be foreseen by S as a real rather than fanciful possibility, but need not be seen as probable. For an explanation of the English law prior to *Jogee*, and discussion of some of the associated problems, see A.P. Simester *et al*, *Simester and Sullivan’s Criminal Law* 5th edn (Oxford: Hart Publishing, 2013) § 7.5 (hereafter *Simester and Sullivan* 5edn).

⁸ Notice that this is primarily an *actus reus* distinction, albeit one accompanied by *mens rea* differences: *Simester and Sullivan* 5edn, §§ 7.5, 7.5(v)(a). We return to this important point below.

liability even where S has actively discouraged P from committing crime B, but proceeded nonetheless with the plan to commit Crime A.⁹

That boat has now sailed from English shores. No longer can S become guilty of foreseen ancillary crimes by pursuing a shared criminal purpose with P. S must be a party *directly* to any crime of which S is convicted. *Extended* joint criminal enterprise liability is thus interred, at least for now.

So much is well known. What may be less obvious is that the doctrine of *joint criminal enterprise* itself—of “plain vanilla” joint enterprises,¹⁰ as Lord Hoffman once called them—is also abolished. Suppose that S and P decide to attack V. They find and confront V, who is punched by P. Prior to *Jogee*, S could be convicted of battery just in virtue of the fact that S had a common purpose with P that the battery be committed. No more. From the perspective of complicity liability, a common unlawful purpose is no longer doctrinally significant (although it may still have evidential significance). What must now be shown, under English law, is that S *aided, abetted, counselled, or procured* P’s crime. Of course, the practical effects of this second difference are small. Doubtless, S can still be convicted of battery, since it will usually be straightforward to prove that one who joins in a common purpose thereby encourages the perpetrator. (More on this below.) But this is now a matter to be proved in its own right. In terms of formal doctrine, it is the encouragement, not the shared purpose, that must now be shown.¹¹

Understandably, given its limited practical implications, the Supreme Court did not explicate this aspect of its decision. But it emerges as an implication of the Court’s more general approach to complicity liability. The core idea that underpins *Jogee* is that all forms of complicity liability must be channelled through the “aid, abet, counsel, or procure” formula¹²—in essence, through assistance or encouragement.¹³ There is no other *actus reus* channel via which secondary liability can pass. The Supreme Court did not merely reject the idea that parasitic accessory liability is part of the common law. It went for a much bigger fish: that common purpose does not exist as a legal category at all. In practice, the implications are twofold: that S can only participate in P’s crime if S is shown to have actually *assisted or encouraged* the commission of *that* crime. More precisely, S must assist or encourage P’s actual crime (the *actus reus*), with intent (the *mens rea*) to assist either a crime of that type¹⁴ or one of a set of crimes including the crime actually committed.¹⁵

And that’s not all. In presenting *Jogee* as a reassertion of the fundamental common-law principles of complicity, the third major contribution of the Supreme Court was to restate the traditional *mens rea* requirements for aiding and abetting, which it articulated in terms of knowledge and intention. Citing classic cases such as *National Coal Board v Gamble*¹⁶ and *Johnson v Youden*,¹⁷ *Jogee* implicitly—oddly, not explicitly—overrules a line of Court of Appeal decisions, going back at least to *Rook*,¹⁸ in which foresight of P’s possible actions falling short of knowledge was said to suffice for S’s liability.

This last move is, as we shall see, a crucial development in light of the Court’s abolition of joint criminal enterprise liability. For many common-law jurisdictions, a dual-channel approach to

⁹ *Powell*; *English* [1999] 1 A.C. 1 at 11 (Lord Mustill), 20 (Lord Hutton); [1997] 4 All E.R. 545 at 548, 556-557.

¹⁰ *Brown and Isaac v The State* [2003] UKPC 10 at [13].

¹¹ See *Jogee*, at [78]; cf. also at [66]: “There can be no doubt that if [S] continues to participate in crime A with foresight that [P] may commit crime B, that is evidence, and sometimes powerful evidence, of an intent to assist [P] in crime B. But it is evidence of such intent..., not conclusive of it.”

¹² Cf. s. 8 of the Accessories and Abettors Act 1861, as amended by s. 65(7) of the Criminal Law Act 1977.

¹³ *Jogee*, at [89]. The Court did not consider the possibility that procurement may involve some other form of contribution, but that point is incidental here.

¹⁴ Cf. *Bainbridge* [1960] 1 Q.B. 129; [1959] 3 All E.R. 200.

¹⁵ Cf. *DPP for Northern Ireland v Maxwell* [1978] 1 W.L.R. 1350; [1978] 3 All E.R. 1140.

¹⁶ [1959] 1 Q.B. 11; [1958] 3 All E.R. 203.

¹⁷ [1950] 1 K.B. 544; [1950] 1 All E.R. 300.

¹⁸ [1993] 1 W.L.R. 1005; [1993] 2 All E.R. 955 (liability if S foresees the crime “as a real or serious risk”). Cf. *Reardon* [1999] Crim. L.R. 392 (contemplation of a “strong possibility” sufficient); *Bryce* [2004] EWCA Crim 1231; [2004] 2 Cr. App. R. 35 (p.592) (S need only contemplate a “real or substantial risk” of P’s crime).

complicity liability is enshrined in statute,¹⁹ so the reductionist move in *Jogee* is out of the question.²⁰ That was not the case in Australia's uncodified jurisdictions. As it happens, the High Court considered Australian common law to be settled by the Court's own well-established precedents.²¹ At the level of policy, however, the Court in *Miller* emphasised "the undesirability of altering the doctrine of extended joint criminal enterprise without examining the law with respect to secondary liability generally."²²

So there are two key questions here. First, as a matter of formal doctrine, how plausible is the claim that the common law knows only one *actus reus* channel to complicity liability? How deeply rooted in the case-law is (or in England was) the set of doctrines governing joint criminal enterprise liability? Secondly, to what extent does their abolition impoverish English law? Particularly in light of the forceful reassertion of basic aiding and abetting principles by the Supreme Court, can those principles adequately fill the vacuum—in terms of both *actus reus* and *mens rea* requirements—created by abolishing joint criminal enterprise liability and, especially, its extended counterpart?

II. ON THE HISTORICAL BACKGROUND

In terms of the actual reasoning in *Jogee*, the Supreme Court did not formally "abolish" joint criminal enterprise liability. Rather, it concluded that on the better view of the cases, such doctrines were by 1984 no longer known to the law. The idea of common unlawful purpose as a separate ground of liability involves a "wrong turn", a mistake (re)introduced into the law by the Privy Council in *Chan Wing-Siu*.²³ As the Supreme Court accepted, common purpose doctrines existed prior to the nineteenth century. After that, however, "there was a significant change of approach",²⁴ and they disappeared. Reviewing the case law, the Court concluded that "the introduction of the principle [by *Chan Wing-Siu* in 1984] was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments."²⁵

That verdict seems far too strong. This is not the place to undertake an extended trawl of the nineteenth- and twentieth-century cases.²⁶ However, three main points may be made here.

First, for almost its entire history, the common law of crimes has known doctrines of common (unlawful) purpose. Leave aside the issue of extended joint criminal enterprises; we shall come to that. In terms of "plain vanilla" joint enterprises, it has never seriously been doubted that, if S and P come together with a common purpose to do crime A, S is liable for A when done by P, without proof that S assisted or encouraged P. Shared pursuit of the common purpose was in itself a form of criminal participation. Thus Hale observes that "if divers come to commit an unlawful act, and be present at the time of Felony committed, though one of them only doth it, they are all Principals."²⁷ The same view is held by Foster.²⁸ In part, the significance of presence was tied to the old distinction between principals in the second degree and accessories before the fact. But its significance did not vanish with the passing of section 8 of the Accessories and Abettors Act 1861, which was after all

¹⁹ See, e.g., Criminal Code 1985 (Canada), s. 21(1) and (2); Crimes Act 1961 (NZ), s. 66(1) and (2); Penal Code 1860 (India), ss. 34 and 107.

²⁰ Cf. *Cecilia Victoria Uhrle v The Queen* [2016] NZSC 64.

²¹ Notably *McAuliffe v The Queen* [1995] HCA 37; (1995) 183 C.L.R. 108; *Osland v The Queen* [1998] HCA 75; (1998) 197 C.L.R. 316; *Gillard v The Queen* [2003] HCA 64; (2003) 219 C.L.R. 1; *Clayton v The Queen* [2006] HCA 58; (2006) 81 A.L.J.R. 439; *Huynh v The Queen* [2013] HCA 6; (2013) 87 A.L.J.R. 434.

²² *Miller*, at [41]; a point made previously by the same Court in *Clayton* [2006] HCA 58; (2006) 81 A.L.J.R. 439 at [19].

²³ [1985] A.C. 168.

²⁴ *Jogee*, at [21].

²⁵ *Jogee*, at [79].

²⁶ Since drafting this essay, I have had the benefit of reading Findlay Stark's considerable survey of the case law in "The Demise of 'Parasitic Accessorial Liability': Substantive Judicial Law Reform, Not Common Law Housekeeping" (2016) 75 C.L.J. 000. Stark concludes, persuasively, that *Jogee*'s claim to be merely "correcting" rather than substantively reforming the law should be rejected.

²⁷ *Pleas of the Crown* (1678) 215.

²⁸ *Crown Law* (1762) Discourse III, Ch. 1, esp. §§ 6, 9.

merely a procedural amendment.²⁹ Thus, as late as 1964, J.W.C. Turner's 12th edition of *Russell on Crime* treated presence pursuant to a common unlawful purpose as an alternate form of participation:³⁰

“if a special verdict against a man as a principal does not show that he did the act, or was present when it was done, or did some act at the time in aid which shows that he was present, aiding and abetting, or that he was of the same party, in the same pursuit, and under the same expectation of mutual defence and support with those who did the fact, the prisoner cannot be convicted.”

So too Glanville Williams: “A person is guilty of aiding and abetting [i.e. as principal in the second degree] if he is either (a) a conspirator who is present at the time of the crime, whether or not he assists, or (b) anyone who knowingly assists or encourages at the time of the crime....”³¹ The key point here is that if S joins in a group criminal enterprise to commit a crime, it need not be shown that P received actual assistance or encouragement from S, or indeed (in the case of encouragement) that P was even aware of S. S's liability for that crime arises from participation in the common unlawful purpose, not in a distinct act of aiding or abetting P.

This is entirely sensible. *Of course* a conspirator is, and should be, an accomplice when the agreed crime is ultimately perpetrated. S should be an accomplice in virtue of being party to the conspiracy. Once again, this is primarily an *actus reus* point. In practice, trial courts do not expect to see distinct evidence of assistance or encouragement in such cases; yet neither do they invoke any kind of deeming rule to bridge the logical gap between conspiracy and abetment.³² It is proof of the conspiracy itself that does the work.³³

Admittedly, as noted earlier, the practical gap between “plain vanilla” joint enterprises and abetment is small. Most instances of a common purpose between S and P to commit crime A will support an inference of encouragement by S. Perhaps not all, though. A prosecutor put to prove abetment might struggle to do so when S joins a large group whose plans are already formed and where P is unaware of S's actions. The Court in *Jogee* rightly observes that S's encouragement need not make a difference.³⁴ But that does not let the prosecution out of proving that it was *received by P*, nor that it was *intended as encouragement*; in particular, intended as encouragement *of P*. Debating niceties of this sort in the context of joint criminal enterprises seems to miss the point. It is more natural, and better aligned with the history, to embrace such enterprises as a form of participation *per se*. Refusal to do so will inevitably generate hard cases likely to be finessed with artificial reasoning.

Extended joint criminal enterprise liability

No amount of finessing could explain parasitic accessorial liability, of course. Here the analysis is more complex. According to the Supreme Court, extended joint enterprise liability may have been part of eighteenth century common law, but

“cases in the 19th century show that there was a significant change of approach. It was no longer sufficient for the prosecution to prove that the principal's conduct was a probable consequence, in the ordinary course of things, of the criminal enterprise instigated or agreed

²⁹ Cf. *Jogee*, at [6].

³⁰ J.W.C. Turner, *Russell on Crime* 12th edn (London: Sweet & Maxwell, 1964) 139.

³¹ *Criminal Law: The General Part* 2nd edn (London: Stevens & Sons, 1961) 353.

³² At one point ([78]), the Court suggests in *Jogee* that an agreement between S and P “is by its nature a form of encouragement.” This seems to be a pragmatic generalization rather than a proposed new rule of law. Moreover, one can join in a common purpose without forming an agreement as such with P—although, of course, the purpose must be shared rather than coincidental: cf. *Petters and Parfitt* [1995] Crim. L.R. 501.

³³ Indeed, the same ought in principle to apply to conspirators “before the fact” as well as those present and pursuing the agreed crime: cf. *Pinkerton v United States* 328 U.S. 640, 66 S. Ct. 1180 (1946). *Pinkerton* is controversial in the U.S. because it confirms a strict liability extended-joint-enterprise rule for all conspirators (even when S is not present). But it is not controversial on the question of “plain vanilla” scenarios.

³⁴ *Jogee*, at [12].

to by the secondary party. The prosecution had to prove that it was part of their common purpose, should the occasion arise.”³⁵

In *Jogee*, the Court purports to document the demise of extended liability for ancillary crimes. If we also accept the claim that there is only one *actus reus* channel to complicity liability, we reach the Court’s conclusion that S must *directly aid or abet* every crime of which S is convicted.

Numerous nineteenth- and even twentieth-century authorities do not support that conclusion. In the 1838 decision of *Macklin and Murphy*,³⁶ for example, the traditional rule for extended joint criminal enterprises is restated in signal terms: “if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all.” It is worth emphasising that this is not even a rule of extended liability for *probable* consequences. It is a rule of strict liability, constrained only by the limitation that P must commit crime B in pursuance of the shared unlawful purpose. There is an interesting, and significant, distinction at work here. The older writers generally differentiated, albeit not without exception, between parasitical accessory liability for *accessories before the fact*—which extended to ancillary crimes by P that were probable consequences of the assisted or encouraged wrong³⁷—and parasitical accessory liability for *principals in the second degree* who, participating in the actual pursuit of crime A, were held strictly liable for crimes committed within the scope of that pursuit.³⁸ Both rules were harsh, but they were not the same rules; indeed, the distinction between principals in the second degree and accessories used to be regarded as fundamental, so that an indictment as accessory before the fact to a crime was bad if the defendant was in fact present at the crime.³⁹

Following enactment of the Accessories and Abettors Act 1861, the distinction between principals in the second degree and accessories before the fact became procedurally unimportant, and with it the substantive differences also started to break down.⁴⁰ In particular, parasitic accessorial liability became restricted to contexts in which the parties were pursuing a common unlawful purpose. At the same time, statements of extended common purpose liability began to incorporate the objective, probability-based criterion formerly restricted to accessories before the fact.⁴¹ Meanwhile, running in parallel with this development was the rise of subjectivism. Expressions of a strict liability rule for crimes ancillary to a joint criminal enterprise are found well into the twentieth century, for instance in the 1943 case of *Appleby*,⁴² but it is fair to say that the mid-nineteenth century onwards saw the gradual evolution of a *mens rea* requirement. Across time, liability became restricted so as to exclude ancillary crimes that were not actually contemplated by S.⁴³

However, this was merely a shift of the *mens rea* requirement for crime B, not an abandonment of the extensional structure. Strikingly, even this shift is not reflected in *Russell on Crime* until the 1958 edition, the second edited by J.W.C. Turner. The 9th edition, edited by Ross in 1936, submitted “that the true rule of law is, that where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing such common unlawful outcome, all are guilty.”⁴⁴ The

³⁵ *Jogee*, at [21].

³⁶ (1838) 2 Lewin. 225; 168 E.R. 1136.

³⁷ Cf. Foster, *Crown Law* (1762) Discourse III, Ch. 3, § 3; 1 Hale P.C. 436.

³⁸ See, e.g. *Plummer* (1701) 12 Mod. 627 at 630, 88 E.R. 1565 at 1567 (Holt CJ), discussed in Foster, *Crown Law* (1762) Discourse III, Ch. 1, § 7; cf. 1 Hale P.C. 444.

³⁹ *Gordon* (1789) 1 Leach 515; 1 East P.C. 352; *Stewart* (1818) Russ. & Ry. 363; 168 ER 846.

⁴⁰ Witness the interesting disagreement between J.W.C. Turner (*Russell on Crime* 11th edn (London: Sweet & Maxwell, 1958) 166-167) and Glanville Williams (*Criminal Law: The General Part* (London: Stevens & Sons, 1953) 222) regarding the decision in *Brown* (1878) 14 Cox 144 that one who was present at a crime could not be convicted as an accessory before the fact.

⁴¹ S. Prentice, *Russell on Crime* 5th edn (London: Stevens, 1877) 164 (passage quoted in the text below). Cf. the Criminal Code (Indictable Offences) Bill of 1878, cl. 71; also colonial codes of the era, e.g. Criminal Code 1892 (Canada), s. 61(2); Criminal Code Act 1893 (NZ), s. 73(2).

⁴² *Appleby* (1943) 28 Cr. App. R. 1 (C.C.A.); see also *Betts and Ridley* (1931) 22 Cr. App. R 148 (C.C.A.).

⁴³ See, e.g., *Betty* (1963) 48 Cr. App. R. 6 at 10 (C.C.A.); *Davies v DPP* [1954] A.C. 378 at 401; [1954] 1 All E.R. 507 at 514 (H.L.).

⁴⁴ R.E. Ross, *Russell on Crime* 9th edn (London: Stevens & Sons, 1936) 1481.

same phrasing, which originated in the 1877 edition, was continued by Turner for the 10th edition before being replaced by him with a subjective test of contemplation: “It is not essential that there should have been an agreement in express terms as to what the principal in the first degree should do; the aider and abettor will be responsible for anything done in the joint enterprise which the evidence shows was within his contemplation.”⁴⁵ It is inconceivable that Turner, perhaps the leading academic criminal lawyer of the first half of the twentieth century, should have been so confused as to make this claim about a doctrine that had during the nineteenth century ceased to exist. The better view is that, by the time Turner wrote those lines, the doctrine had become modified, in terms of its *mens rea* requirements, but not abolished.

The ‘scope’ of the common purpose

Why was this not obvious? The problem lies in a hidden ambiguity. Let’s look again at the Court’s analysis: “It was no longer sufficient for the prosecution to prove that the principal’s conduct was a probable consequence, in the ordinary course of things, of the criminal enterprise instigated or agreed to by the secondary party. The prosecution had to prove that it was part of their common purpose, should the occasion arise.”⁴⁶ But these are obviously not the same propositions. The conclusion that the law had drifted to a subjective, foresight-based test for extended joint criminal enterprise liability is not the same thing at all as a conclusion that extended joint criminal enterprise liability was no more; or that accessory liability—in 1950, let alone 1900—lay only if the “ancillary” crime was *itself* jointly intended.

This is not to suggest that the Court confused foresight with intention. As has been settled at least since *Woollin*,⁴⁷ the two are not the same. *Jogee* confirms the distinction.⁴⁸ Indeed, to hold otherwise would more or less restore us to our starting point, leaving us with extended joint criminal enterprise liability by another name.

What the Court did, though, was to elide a distinction between the shared purpose and the *scope of the pursuit* of that shared purpose. Specifically, the Supreme Court relied heavily upon a discussion of three cases that post-date Turner’s revision: *Wesley Smith*,⁴⁹ *Anderson and Morris*,⁵⁰ and *Reid*.⁵¹ But those cases do not establish the proposition the Court needs. Each of them turns on the issue of whether the principal’s conduct was *foreseen or contemplated* by the accomplice, not on whether it was intended. In *Anderson and Morris*, the trial judge had directed that S could be convicted “even though he had no idea that [P] had armed himself with a knife”;⁵² it was on this basis that S’s conviction was quashed. *Wesley Smith* is, if anything, even clearer:⁵³

“The grounds of appeal in this case although worded in different ways really, as I understand them, amount to the same thing; that is, that the use of a knife by [P] in this case was a departure, that is to say, assuming ... that [S] was a party to some concerted action being taken against the barman, he certainly was not a party to the use upon the barman of a knife which resulted in the barman’s death. It is significant, as I have shown by reading Smith’s own statement, that he knew that Atkinson carried a knife. Indeed, I think he knew that one of the other man carried a cut-throat razor. It must have been clearly within the contemplation of a man like [S] who, to use one expression, had almost gone berserk himself to have left the public-house only to get bricks to tear up the joint, that if the bar tender did his duty to quell the disturbance and picked up the night stick, anyone whom he knew had a knife in his possession, like [P], might use it on the barman, as [P] did. By no stretch of imagination, in

⁴⁵ J.W.C. Turner, *Russell on Crime* 11th edn (London: Stevens & Sons, 1958) 152.

⁴⁶ *Jogee*, at [21].

⁴⁷ [1999] 1 A.C. 82; [1998] 4 All E.R. 103 (HL).

⁴⁸ *Jogee*, at [83], [87].

⁴⁹ [1963] 1 W.L.R. 1200; [1963] 3 All E.R. 597.

⁵⁰ [1966] 2 Q.B. 110; [1966] 2 All E.R. 644.

⁵¹ (1976) 62 Cr. App. R. 109; [1976] Crim. L.R. 570.

⁵² [1966] 2 Q.B. 110 at 118E-F; see also at 120B-C.

⁵³ [1963] 1 W.L.R. 1200 at 1206.

the opinion of this court, can that be said to be outside the scope of the concerted action in this case.”

Neither, by any stretch of the imagination, can that be said to be their shared unlawful *purpose*. It is apparent from this passage that the Court understood a “departure” from the scope of the common purpose to involve an act going not merely beyond the core purpose shared by S and P but beyond activities contemplated as potential acts done in pursuit of that shared purpose. The *scope* of the common purpose is not the same as the core purpose itself, and the Court of Criminal Appeal understood that. Correspondingly, not everything that is within the scope of the shared or “common purpose” needs itself to be jointly intended or purposed. This point was seen too in *Reid*, where the trial judge’s direction “was unduly favourable to the accused as he did not say how far beyond the common design the odd man out would have to go to justify the acquittal of the others.”⁵⁴

All this suggests that the Court in *Chan Wing-Siu* did not make a “wrong turn” at all in 1984. Admittedly, the Court of Appeal in *Reid* does suggest at one point that if death or serious injury “was not *intended* by [P’s companions], they must be acquitted of murder”; but nothing in the case turned on that statement, and the sentence continues: “having started out on an enterprise which *envisaged* some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter.”⁵⁵ Moreover, the equivocal language in this and other decisions hardly offers a basis for overturning, with little substantive engagement, a series of considered judgments by strong benches in the Privy Council,⁵⁶ the House of Lords,⁵⁷ and the Supreme Court,⁵⁸ all of which confirmed that parties to a common unlawful enterprise are liable for foreseen crimes perpetrated in furtherance of that enterprise.

III. FILLING THE VACUUM

Be that as it may, common unlawful purpose doctrines are gone for now from English law. It seems inevitable that the legal requirements in the remaining secondary liability channel will in turn come under pressure. Indeed, the Court of Appeal has previously suggested that foresight of P’s *possible* crime may suffice to ground liability for aiding or abetting, using reasoning that drew explicitly upon joint enterprise case law.⁵⁹ Perhaps needless to say, one important consideration behind arguments for preserving the separation of joint enterprise doctrines was to avert that risk.⁶⁰

Against that backdrop, the reassertion in *Jogee* of traditional, intention- and knowledge-based *mens rea* requirements for aiding and abetting is very welcome. Suppose that S does something, otherwise lawful, that happens to help P commit a crime. If S foresees a risk of what P may do so, S may well be eligible for moral censure. But it is quite another thing to convict S of P’s crime. Lots of everyday things we do have the potential to encourage or facilitate crime. If the state wants to deter such conduct, it ought to do so by specific prohibitions, not by making ordinary people gamble with their criminal liability via generic complicity laws. A familiar example is the computer seller who facilitates music piracy. Similarly, if I leave my employer’s laptop on the seat of a friend’s car, aware that a known thief is operating in the neighbourhood, I may deserve reproach but I do not abet its theft; nor vandalism of the car. Respectable citizens like shopkeepers should not be obliged to stop trading, on pain of risking convictions, whenever they are aware that P may put what is purchased to criminal use. The same goes for the rest of us going about our everyday activities, whenever we realise there is a risk some miscreant will exploit what we do.⁶¹ *Jogee* reassures us that we don’t

⁵⁴ (1976) 62 Cr. App. R. 109 at 111.

⁵⁵ (1976) 62 Cr. App. R. 109 at 112 (emphases added).

⁵⁶ *Chan Wing-Siu* [1985] A.C. 168; [1984] 3 All E.R. 877 and *Hui Chi-Ming v R.* [1992] 1 A.C. 34; [1991] 3 All E.R. 897.

⁵⁷ *Powell*; *English* [1999] 1 A.C. 1 and *Rahman* [2008] UKHL 45; [2009] 1 A.C. 129.

⁵⁸ *Gnango* [2011] UKSC 59; [2012] 1 A.C. 827.

⁵⁹ *Rook* [1993] 1 W.L.R. 1005 at 1009.

⁶⁰ Cf. A.P. Simester, “The Mental Element in Complicity” (2006) 122 L.Q.R. 578.

⁶¹ It is worth noting that there is already potential liability for such events through tort law. See, e.g., *Stansbie v Troman* [1948] 2 All E.R. 48.

always have to forego ordinary, law-abiding conduct just because there is a risk that others might misbehave. On the other hand, we do come under such obligations when practically sure what P *will* do: “the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires *knowledge* of any existing facts necessary for it to be criminal”.⁶²

Granted, the criminal law has a general interest in stopping people from helping or encouraging others to commit crimes, even unintentionally. There is a trade-off here, between protecting potential victims and preserving the freedom of ordinary citizens whose activities are by themselves lawful. To convict S is, in effect, to confirm the prohibition of S’s conduct. *Mens rea* requirements play a crucial role in negotiating the scope of such prohibitions. In the case of citizens who do not themselves harm or wrong others, requiring *knowledge* of P’s actions narrows the scope of complicity prohibitions so as to allow them to live their lives without being impeded by fear of what P *may* do; the complicity-based prohibition is not of *risking* help or assistance, but of rendering it intentionally.

Neither is this to claim that it should always be permissible to take such risks, especially unreasonable risks, when facilitating or encouraging the conduct of others. But the prohibition of such risk-taking, where appropriate, should be effected by means of more specific offences and other forms of regulation such as licensing regimes. This is an area where the law needs to give otherwise law-abiding citizens firmer and clearer guidance, without requiring them to make normative guesses about the legal risks involved in pursuing their own lives. Specific offences enable the state to do that.

The mishandling of intention

The merits of requiring knowledge when aiding or abetting are all very well, but does *Jogee* commit to them unequivocally? Perhaps not. Doctrinally speaking, the Supreme Court’s decision looks at first straightforward. The Court asserts that the essence of aiding and abetting is *intentional* assistance or encouragement. It follows on standard legal principles that S must intend his or her own contribution but need not intend P’s conduct. It is the assistance of the crime, not the ultimate crime itself, that must be intended by S.⁶³ In turn, just as with attempts liability,⁶⁴ an “intention” to do some action requires an intention with respect to the behavioural and consequential components of that action, but is generally satisfied by knowledge or settled belief (with no significant doubt) regarding the action’s circumstance elements.⁶⁵ The same analysis applies here. It suffices to establish S’s intention to assist or encourage P’s crime if S intends his or her own contribution, being sure what P will do. From S’s perspective, the latter is a circumstance element.

Unfortunately, when the Court concludes by restating basic complicity principles,⁶⁶ their Lordships’ handling of the *mens rea* requirement becomes insecure. Consider, first, the distinction between S’s intending to aid/abet and S’s desiring that P’s crime be committed. According to the Court,⁶⁷

“In cases of concerted physical attack there may often be no practical distinction to draw between an intention by D2 to assist D1 to act with the intention of causing grievous bodily harm at least and D2 having the intention himself that such harm be caused. ... However, as a matter of law, it is enough that D2 intended to assist D1 to act with the requisite intent. *That may well be the situation if the assistance or encouragement is rendered some time before the crime is committed and at a time when it is not clear what D1 may or may not decide to do.* Another example might be where D2 supplies a weapon to D1, who has no lawful purpose in

⁶² *Jogee*, at [9]; emphasis added. Cf. *Anwar* [2016] EWCA Crim 551; [2016] W.L.R. (D.) 349 at [20]–[22].

⁶³ Cf. *Bryce* [2004] EWCA Crim 1231 at [61]. Contrast procuring: cf. *A-G’s Reference (No. 1 of 1975)* [1975] Q.B. 773 at 779; [1975] 2 All E.R. 684 at 686 (CA).

⁶⁴ *Pace and Rogers* [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867; noted (2015) 131 L.Q.R. 169.

⁶⁵ *Simester and Sullivan* 5edn, § 5.4.

⁶⁶ *Jogee*, at [88ff].

⁶⁷ *Jogee*, at [90] (emphasis added).

having it, intending to help D1 by giving him the means to commit a crime (or one of a range of crimes), but having no further interest in what he does, or indeed whether he uses it at all.”

But it is important to see that the case of joint attack is not analogous to the case of assistance or encouragement rendered “some time before the crime is committed”.

In establishing this, let us start with the latter type of case, of old-fashioned accessoryship before the fact. Suppose that S, a respectable builder, lends P a jemmy. S realises P that *may* use it to commit a burglary, but is uncertain whether P will, and (as the Supreme Court puts it) has no further interest in what P does. For the reasons summarised earlier, S ought not to be guilty of the burglary that P ultimately commits.

An intention/knowledge test bears this out. On both law and ordinary language, *S lacks the intention to assist P’s burglary*.⁶⁸ Of course, if S has a further interest, and acts *in order* to assist P should P decide to commit the envisaged crime, that suffices to establish the requisite intention by S.⁶⁹ (In accordance with ordinary principles of direct intention, this holds even if S thinks it very unlikely that P will commit the crime.) Similarly, it generally suffices for S to *know*, in the sense of having no significant doubt, that P will commit one of a list of crimes.⁷⁰ This is standard law since *Nedrick* and *Woollin*.⁷¹ But it is also where the law stops. In order to intend X, one must either act in order to bring X about or act knowing (i.e. being virtually certain) that one will bring X about. The same applies to aiding and abetting. In order to intend “to assist P to commit a burglary”, S must either act *in order* to assist P to commit a burglary (i.e. because for some reason S has an interest in P’s committing it), or act in the practical certainty that his or her conduct *will* assist P to commit a burglary. Will, not may.

Undoubtedly, the stringency of this standard will generate unattractive results. Hard cases often do. But consider the following example:⁷²

S illegally sells handguns. P buys a gun from S. He tells S that he will use the weapon to kill V, his partner, if V (despite being warned) continues to steal from their joint business. P says he is confident that V has given up his defalcations, so the need to kill V may not arise. S could not care less what P does with the gun and is interested only in the money she is paid for it. P later uses the gun to kill V.

There are strong policy arguments in favour of holding S guilty of murdering V and not merely guilty of offences under gun control legislation. Surely, we might propose, it suffices that S *knows* P will be assisted by S’s conduct, *if* P ultimately does commit crime A? It does not. Many of those policy arguments are specific to the particular example. Once we leave them aside, subject to one important point to be considered below, the example is not significantly different from that of the computer sale, or indeed the laptop theft, both of which would satisfy our proposed test. Much of the normative power in the handgun scenario depends upon the fact that S’s conduct is already illegal (and reprehensible). *But that feature can no longer make any legal difference to S’s liability*. The only channel of complicity within which S’s liability ever turned on the legality of S’s own conduct was common unlawful purpose. Under the core doctrines of assistance/encouragement, it has never been relevant whether S’s conduct was independently illegal.

Change the guns, then, to baseball bats. Obviously we don’t want to shut down sports goods vendors. Suppose, once more, that P tells S why he is buying the bat (“just in case”). Is it criminal complicity for S to sell P the bat?

⁶⁸ Care is required to avoid two mistakes here. First, intending to do something that one *knows* will assist P to commit the burglary, should P decide to proceed, is not the same thing as intending to *assist P’s burglary*. Secondly, there is some ambiguity in the terminology of intention, in that we sometimes say that a person does a thing “intentionally” (or more poignantly, deny that it is done “unintentionally”), by which we mean that the person advertently took the risk of doing that thing, even though they did not “intend” it. It is the latter concept—intention, not intentionality—that counts here.

⁶⁹ Cf. *Jogee*, at [10].

⁷⁰ *Jogee*, at [90] (last sentence of paragraph); see also at [14]–[16].

⁷¹ *Nedrick* [1986] 1 W.L.R. 1025; [1986] 3 All E.R. 1 (CA); *Woollin* [1999] 1 A.C. 82.

⁷² Thanks to Bob Sullivan for pressing this thought.

As the passage quoted earlier in this section suggests, the Supreme Court thinks it is. The Court can only be right about that if we can truly say that *S intends* to assist *P*'s killing of *V*. Again, however, *Nedrick* and *Woollin* stand in the way. *S* does not act in order to assist *P* to kill. Neither does *S* act in the practical certainty that *P* will use the bat to kill.

The mishandling of conditional intention

The Court obscures this difficulty by its repeated assertion that *S*'s intention "may be conditional".⁷³ But in the baseball bat example, *S* has no conditional intention. It is *P* whose intention is conditional. Admittedly, this example presents a special case. *S* knows that the bat will be used to kill *given* a certain contingency. This makes it a stronger case for criminalisation than the computer sale or laptop theft examples. Perhaps the normal *mens rea* requirements for aiding and abetting should be supplemented to accommodate liability for this kind of "contingent knowledge" case. (Although it is hard to see how to do so without criminalising the computer seller or the lazy laptop leaver, unless we introduce a new set of highly technical and practically unworkable *mens rea* distinctions.) Either way, however, we should not pretend that this case, special though it be, meets the definition of intending, conditionally or otherwise, to assist a killing.

Crucially, this objection can be generalised to virtually all cases of assistance or encouragement "rendered some time before the crime is committed and at a time when it is not clear what *D1* may or may not decide to do."⁷⁴ Talk of conditional intention in this context is a red herring. Once *S*'s help or encouragement is rendered, *there can be no question of S having a conditional intention*. *S*'s part is done. Any conditional intention to do something requires that the thing to be done lies in the future. For prior aiding and abetting, it is therefore essential that, *at the time of S's own actions*, *S* already holds the crystallised, unconditional intention to assist or encourage the very crime (perhaps among others) that *P* ultimately commits.

It may be helpful to elaborate upon this point. A conditional intention is a species of future intention, in the sense that one holds a conditional intention to do *X* when one holds an intention to do *X* should the relevant condition be met at some time in the future. Such an intention imports two key constraints. First, *X* must lie in the future, in that one is not yet actually doing *X*, although that moment may be close at hand. Secondly, whatever else it relates to, *S*'s intention must also relate to an action *by S*. Someone who opens the back door of a lorry intending to steal the contents should they be valuable still has an action to do (i.e., steal the contents). Hence they can have a conditional intention to steal the contents at the point when they open the door.

But when there is an act of aiding or abetting, *S* has nothing left to do. What lies in the future is *P*'s action. And that action is up to *P*, not *S*. Save in special cases of causing or procuring, *S* cannot intend *that P will do X*. *S* can of course act *in order* to help or encourage *P* to do *X*: *S* can intend his or her own act of *helping* or *encouraging* *P*'s action. But *S* can't intend *P*'s action. Neither can *S* intend *P*'s *mens rea*.⁷⁵ And so *S* can't conditionally intend them either.

None of this is to deny the possibility of conditionally intending to help another. However, that would be a case where *S* has not yet rendered help, and means to do so only if some further condition is met (e.g. if *P* pays the agreed fee, or turns out to be a friend, etc.). In such a case, the *actus reus* of *S*'s aiding has not yet occurred, so participation cannot be established. By contrast, once the help is rendered—the gun is passed to *P*—that help is either intended or not. It cannot be conditionally intended: it is done. Of course, there are still conditions to be met before we can say that *S* did actually aid *P* to do *X*. Notably, *P* must go on to do *X*. But that is an *actus reus* condition, not a *mens rea* one.

⁷³ E.g. *Jogee*, at [92].

⁷⁴ *Jogee*, at [90].

⁷⁵ *Pace* D. Ormerod and K. Laird, "*Jogee*: Not the End of a Legal Saga but the Start of One?" [2016] Crim. L.R. 539, 540. The authors are drawn into error here by an oversimplification (at 544): "Knowledge speaks to the present and intention to the future." But not all intentions are future-related. One may intend a punch even as one throws it. The more important distinction here is between consequences and circumstances. In standard cases of aiding and abetting, from *S*'s perspective, *P*'s *mens rea* is a circumstance and need not itself be intended.

Part of the difficulty with the Court's restatement is a lack of precision. Aiding or abetting liability requires that, at the time S does the helpful or encouraging act, S intends (either directly or as a foreseen virtual certainty) to help or encourage P *by that act*. Failure to observe this requirement allows the court to state, for example, that⁷⁶

“If [S] joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if [P] acts with intent to cause serious bodily injury and death results, [P] and [S] will each be guilty of murder.”

Yet this passage succeeds only if S's joining with the group was itself an act of encouraging P to commit GBH *and* was intended as such *at that time*. In most of the harder cases, such convenient findings seem unlikely. Moreover, where those findings are unavailable, the act of joining the group drops out of the picture. In terms of aiding and abetting doctrine, it is legally irrelevant. Some *later act* of intentionally (and actually) encouraging or helping P to commit GBH must be found.

Escalation and the importance of presence

Or perhaps such a case could be manslaughter? So the Supreme Court affirms:⁷⁷

“If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter.”

It is hard to see why this conclusion follows under the law of aiding and abetting. Suppose that S joins an enterprise to commit an assault. In joining it, let's concede, S encourages P to commit the assault. (That would of course need to be proved.) P, however, goes on to commit murder by deliberately inflicting serious injuries that cause death. How is it the case that S has intentionally encouraged *that* act? It is true, as the Court notices, that murder and manslaughter are constructive crimes. But that truth does not permit us to bypass the requirement that secondary parties must have encouraged *the (type of) act that caused death*, and that they must have done so intentionally. Of course, one might argue that an unlawful and dangerous act, sufficient for manslaughter, was included in the greater act of inflicting GBH. *But that lesser act did not cause death.*

The Supreme Court's affirmation to the contrary offers us reassurance: while the abolition of parasitic accessorial liability may make murder verdicts harder to obtain in the context of group violence, we need not be unduly concerned because manslaughter verdicts will always be available as a fallback. The only exception to that, according to the Court, will be where P's lethal action constitutes an “overwhelming supervening event”, of the kind recognised in *Anderson and Morris*.⁷⁸ But in truth, *Anderson and Morris* is a fairly typical escalation case.⁷⁹ The gap between what S assumed P would do and what P actually did will consistently, not exceptionally, be at the heart of trial arguments about what kind of act S intended to encourage or assist. If, following escalation, death was not caused by an act of the same type that S meant to encourage, a manslaughter verdict will be unavailable on aiding/abetting principles.

Alternatively, the prosecution may allege an intentional act of encouragement that occurs *after* the violence has “escalated”. But then, as we noted earlier, everything that went before—being “party to a violent attack on another”—is legally irrelevant. It is mere historical setting. It is irrelevant to aiding and abetting doctrines because those doctrines are fundamentally *static*. In accordance with standard concurrence principles, they are tied to a particular act, done at a moment in time when S also has the requisite mens rea. If prior embarkation on a common purpose is doing any work in the

⁷⁶ *Jogee*, at [95].

⁷⁷ *Jogee*, at [96].

⁷⁸ *Anderson and Morris* [1966] 2 Q.B. 110 at 120; cf. *Reid* (1976) 62 Cr. App. R. 109 at 112; see *Jogee*, at [97].

⁷⁹ As the Supreme Court seems to recognise: *Jogee*, at [33].

post-escalation scenario, then that approach fails; and with it the restatement of principles in *Jogee*. This failure is merely concealed by an obfuscatory reference to conditional intentions.

Under common purpose doctrines, of course, there is no need to show a fresh act of aid or abetment, because the common purpose is itself legally significant. Common purpose doctrine is capable of accommodating dynamic scenarios, given the continuing nature of the shared purpose and its pursuit by S and P. Since S's involvement in the common purpose is ongoing, unlike aiding and abetting it can be meaningful to talk of a conditional intention: indeed, the Court's appeal to conditional intention works *only* if we distinguish between common purpose and aiding/abetting. The normative significance of ongoing presence in a joint criminal enterprise also explains why the requirements for withdrawal from a common purpose differed historically: S needed simply to disengage unequivocally from the shared purpose, whereas aid or encouragement must in principle be countermanded.⁸⁰

IV. JUSTIFICATIONS, IN-PRINCIPLE AND INSTITUTIONAL

The English Court of Appeal faces some headaches. A claim that *Jogee* is truer to the pre-1984 history is unpersuasive. Assuredly, the Privy Council, House of Lords, and Supreme Court decisions in *Chan Wing-Siu*,⁸¹ *Hui Chi-Ming*,⁸² *Powell*,⁸³ *Rahman*,⁸⁴ and *Gnango*⁸⁵ have been overturned in substance. In some ways, acknowledging that would help to reaffirm the legitimacy of convictions between 1984 and 2016, since it would imply those convictions were not grounded in misapplied law. (Neither would the view that common unlawful purpose liability was abolished in 2016 raise problems of retrospective criminalisation.) Unfortunately, the Court in *Jogee* did not refer to the 1966 Practice Statement,⁸⁶ nor constitute a larger bench. So the earlier summative court decisions are not formally overruled. In principle, *Jogee* sits alongside them.

Why, then, prefer *Jogee*? Disruptive the decision may be, but as both the High Court of Australia and the Supreme Court recognised,⁸⁷ institutional considerations should not take precedence over profound injustice.

There are no simple solutions in the field of complicity law. The problems are complex and nuanced. Rational arguments can be made both for and against the merits of extended joint criminal enterprise liability. Those arguments are not knock-down ones, and it is not helpful to suggest otherwise. The High Court, while embracing the grip of precedent, addressed those arguments somewhat indirectly. Endorsing the earlier discussion in *Powell*,⁸⁸ the Court pointed to evidential difficulties associated with group wrongdoing, as well as to its inherent dangerousness and tendency to escalate. *Miller* also acknowledges the distinctive normative character of the wrong involved in embarking on a joint criminal enterprise.⁸⁹

On the other hand, the Supreme Court made virtually no effort to argue against joint enterprise liability at the level of principle. It merely pointed to the so-called “anomaly” of requiring a “lower” *mens rea* standard for S than for P.⁹⁰ But the *mens rea* standard isn't lower. It is different. As the well-known case of *Callow v Tillstone* illustrates,⁹¹ sometimes S's *mens rea* can be far more stringent than is demanded of P. Given that *actus reus* requirements differ between accessories and

⁸⁰ This point is not noticed in the Court's discussion of *Hyde* (1672): see *Jogee*, at [13].

⁸¹ [1985] A.C. 168.

⁸² *Hui Chi-Ming v R.* [1992] 1 A.C. 34.

⁸³ *Powell; English* [1999] 1 A.C. 1.

⁸⁴ [2008] UKHL 45; [2009] 1 A.C. 129.

⁸⁵ [2011] UKSC 59; [2012] 1 A.C. 827.

⁸⁶ See *Austin v Mayor and Burgesses of the London Borough of Southwark* [201] UKSC 28; [2011] 1 A.C. 355 at [24]–[25].

⁸⁷ *Miller*, at [39]; *Jogee*, at [79ff].

⁸⁸ [1999] 1 A.C. 1 at 14; see *Miller*, at [36].

⁸⁹ *Miller*, at [34].

⁹⁰ *Jogee*, at [84]. Cf. Gageler J's dissent in *Miller*, at [111] and [120]; also the response by Keane J (concurring with the majority) at [140]–[141].

⁹¹ (1900) 64 J.P. 823.

principals, it is hardly surprising that the *mens rea* elements also differ. S needs to *intend* his or her own act of involvement, *and* have *mens rea* regarding P's acts *as well as* regarding P's *mens rea*. More generally, it is a mistake to think that S's culpability must equal P's. What matters is whether S is *sufficiently* culpable to be held guilty of P's crime.

Still, there is the broader worry that extended joint criminal enterprise law may be Draconian in practice. Curiously, the law in jurisdictions such as Australia, Canada, and New Zealand has not generated parallel controversy to that in England. The High Court in *Miller* was not presented with evidence that it has become a state weapon of systematic injustice.⁹² Albeit without citing any such evidence, the Supreme Court saw things differently. The decision in *Jogee* is clearly informed by a sense that the application of extended joint criminal enterprise liability rules has in recent years produced significant injustice.

Given the lack of analysis of this problem, it is plausible that the difficulty may arise not from common purpose liability doctrine *per se* but from how it has been applied: from over-zealous findings of shared criminal purposes—with foresight—against those on the periphery of wrongdoing. Common purpose liability should be a form of guilt by *enterprise*, not by association; a point emphasised forcefully by the High Court in *Miller*.⁹³ If extended joint criminal enterprise doctrines have indeed been abused, or indeed are prone to abuse, that certainly supplies *a* reason to see them off. But one should always hesitate before casting out the baby with the bathwater. Extended joint criminal enterprise doctrines could instead have been tweaked to avoid overreach,⁹⁴ for instance by tightening the definition of joint enterprises and, perhaps, by requiring that S foresaw P's further crime as *probable*;⁹⁵ or by limiting convictions to cases where S was certain that the collateral offence would be committed by P in the event of particular, foreseen circumstances. Such revisions would, of course, depart from existing case law,⁹⁶ but not to the radical extent that *Jogee* does.

Alas, once joint enterprise liability was castigated as an egregious error in law, it had to go. The Supreme Court backed itself into a corner. That is unfortunate because it meant the Court never took seriously the question whether common unlawful purpose *should* have legal significance. In principle, having two distinct channels of complicity liability affords the law greater flexibility and moral sensitivity when determining whether S is a participant in P's crime. Direct aiding/abetting doctrines are simply too blunt by themselves to capture, without substantial over- or under-inclusion, all forms of association with P's crime that warrant a finding of guilt alongside P.

Despite the attention lavished upon them, the key features of common unlawful purpose liability are not its *mens rea* elements. They are (i) a distinctive *actus reus*, i.e. joining in a common purpose, which cannot simply be reduced to assistance or encouragement; (ii) the unlawfulness of that *actus reus* in its own right; and (iii) S's presence in the pursuance of their common purpose. By collapsing common purpose liability into mere aiding/abetting, the law obviates—and so loses sight of—these crucial features, which are not shared by acts of aiding/abetting. Lending P a jemmy is not anti-social at all *until* we know that P's plans for its use are wrongful.⁹⁷ Setting out with P on a criminal enterprise is entirely a different matter.

The High Court of Australia was right to point to the discussion of merits in *Powell*. As Lord Steyn observed in that case,⁹⁸ joint criminal enterprises are dynamic and often escalate. Unlike aiding/abetting scenarios, S signs up to that dynamic character on an ongoing basis. As such, common unlawful purpose doctrine responds to contingencies of scope, rather than contingencies of S's intention. It allows the common law to accommodate fast-moving developments, provided they occur in the pursuance and within the foreseen scope of the criminal enterprise (in which S has a non-contingent intention to engage), and in the presence of S. Moreover, as Lord Steyn also noted, the

⁹² *Miller*, at [39].

⁹³ *Miller*, at [45].

⁹⁴ Another reform measure, albeit outside the scope of the discussion here, might be to abandon the mandatory sentencing regime for accessories to murder. Cf. *Sanchez* [2008] EWCA Crim 2936; [2009] 2 All E.R. 839.

⁹⁵ Though note the reservation expressed in *Johns v The Queen* [1980] HCA 3; (1980) 143 C.L.R. 108 at 131.

⁹⁶ Cf. *Miller*, at [43]–[44].

⁹⁷ This point is missed by Kirby J, in his dissenting judgment in *Clayton v The Queen* [2006] HCA 58; (2006) 81 A.L.J.R. 439 at [107].

⁹⁸ *Powell*; *English* [1999] 1 A.C. 1 at 14; *Miller*, at [36].

doctrine allows the courts to overcome at least some of the traditional evidential difficulties associated with group wrongdoing.

The Court in *Jogee* overestimates the capacity of aiding/abetting law to accommodate such difficulties. Joint criminal enterprises are a distinct moral phenomenon. Indeed, only by recognising that can we adequately protect the law of aiding and abetting. Absent legislative reform, the inadequacy of traditional aiding/abetting doctrine to deal with the complexity of multi-party wrongdoing will inevitably generate pressure, either to restore joint criminal enterprise liability or—disastrously—to water down the *mens rea* requirements of aiding and abetting itself. Let us hope that London opts for the former, and ultimately realigns itself with Canberra.

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